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No. 440

In the Supreme Court of the United States

OCTOBER TERM, 1968

GEORGIA HIGHWAY EXPRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A5) is not yet officially reported. The Board's decision and order (Pet. A7-A28) are reported at 165 NLRB No. 80.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1968, and a petition for rehearing was

denied on May 28, 1968 (Pet. A2, A6). The petition for a writ of certiorari was filed on August 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly found that the employer had failed to establish that it had permanently replaced economic strikers prior to their unconditional application for reinstatement.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 146, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set forth at page 3 of the petition.

STATEMENT

The Company, a motor freight common carrier, operates a terminal at Atlanta, Georgia (J.A. 292; 277, 284, 9).[1] On the evening of April 12, 1966, at about 9:00 p.m., 49 dock employees on the second shift, who were not represented by a labor organization, began a strike to protest against their working conditions (J.A. 293; 8, 10, 22-28, 39, 19, 287, 166, 235, 239-240, 89). Picket lines were established at each of the terminal entrances, with five or six employees carrying signs reading "On strike" and "Georgia Highway

[1] "J.A." refers to the Joint Appendix to the Briefs in the court below.

Express Unfair To Labor" (J.A. 294; 29-30, 159, 211). Some dock employees reporting for work on the Company's two succeeding shifts, beginning at 1:30 a.m. and 8:30 a.m., refused to cross the picket line, and by the following morning, April 13, the number of strikers had increased to 116 (J.A. 294, 299; 12, 19-20, 288-289, 31-32, 235, 239-241, 89-90, 97-98).

On the morning of April 13, all of the strikers who were not picketing went to the Union [2] hall, where virtually all signed union authorization cards (J.A. 295; 41-42, 55, 211). The Union advised the strikers to apply for reinstatement, and, about noon, after they had returned to the terminal, they decided to terminate the strike. Through a spokesman, Willie Hamm, they offered unconditionally to return to work. After Division Manager Young and Vice-President Dillon Winship, Jr. conferred privately, Young advised the strikers that the Company's attorney was out of town and that no immediate decision could be made (J.A. 295-296; 10-14, 28-29, 57, 42, 56, 72-75, 198). The Company made no claim at that time that the strikers had been replaced (J.A. 296; 14-15, 198). No strikers were reinstated until the period April 18 through April 21, when a total of 48 strikers, including Hamm, were taken back (J.A. 297; 235, 15, 31, 241-242, 91, 172-173). In the ensuing months, additional strikers were offered reinstatement (J.A. 298; 92, 249-250, 38-39, 47-48).

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[2] Truck Drivers and Helpers, Local No. 728, International Brotherhood of Teamsters.

Before the Board, the Company contended that it was not obligated to reinstate the strikers because it had replaced 75 of them prior to their applications and, due to a rerouting of freight, it had no work for the remainder. It sought to support this contention by exhibits showing in conclusionary terms, that 75 new employees had been hired on April 12 and prior to noon on April 13, 1966 (J.A. 235, 244-248), and by the testimony of Division Manager Young (J.A. 167) that he had ordered the hiring of replacements stopped at noon on April 13. However, the Company's exhibits did not show the time when the alleged replacements were hired or reported for work; the person who prepared the exhibits testified that he had not examined any records which showed the hour of hire of any employee (J.A. 300; 123-126); and the Company did not introduce time cards which could have established the time when the new employees reported. Nor did the Company call any supervisor to confirm that he received or followed such an order from Young, or any replacement to testify as to his actual time of hire.[3] Moreover, 21 of the alleged replacements were not new employees but transferees from other operations of the Company, and 16 of them returned to their original terminals shortly after the strike ended (Pet. A16-A18).

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[3] Striker Hamm, whom the Examiner credited, testified that he was present at the site of the picketing from about 9:15 p.m. on April 12 to about 11:00 a.m. on the next day, and that he did not remember seeing anyone unfamiliar enter the Company's premises (Pet. A20, n. 10; J.A. 36-37, 211-213).

The Board concluded that the Company had not established that the strikers had been permanently replaced when they applied for reinstatement on April 13, and that the Company thus violated Section 8(a)(1) of the Act by refusing to reinstate them at that time (Pet. A19-A21). The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement to any of the striking employees who had not yet been reinstated, to make the strikers whole for any loss of pay suffered as a result of the Company's unlawful conduct, and to post appropriate notices (Pet. A24-A25).

The court of appeals sustained the Board's findings and conclusions, and enforced its order in full (Pet. A1-A4).

ARGUMENT

In *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378, this Court held that, "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice"; and the "burden of proving justification is on the employer." Petitioner sought to defend its refusal to reinstate the strikers, when they offered to return to work at noon on August 13, principally on the ground that it had hired 75 permanent replacements. However, the Board found, and the court below agreed, that petitioner had not sustained its burden of establishing that the replacements were hired prior to the strikers' application for rein-